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State of New York Public Employment Relations Board Decisions from August 17, 1998

New York State Public Employment Relations Board

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Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AFSCME COUNCIL 66, LOCAL 1095, AFL-CIO, ERIE COUNTY BLUE COLLAR EMPLOYEES UNION,

Charging Party,

- and -

CASE NO. U-18864

COUNTY OF ERIE (ERIE COMMUNITY COLLEGE),

Respondent.

JOEL POCH, ESQ., for Charging Party

MICHAEL CONNORS, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by AFSCME Council 66, Local 1095, AFL-CIO, Erie County Blue Collar Employees Union (AFSCME) to a decision of an Administrative Law Judge (ALJ) dismissing its charge that the County of Erie (Erie Community College) (County or College) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted the provision of security services at the Advanced Training Center (ATC), an off-campus facility operated by the County.

The ALJ dismissed the charge because AFSCME did not establish its exclusivity over the in-issue work. AFSCME argues in its exceptions that the ALJ erred in not finding that a "discernible boundary"[1] existed around the in-issue work, by finding that AFSCME had waived its exclusivity, and by failing to address the claim that the County continued to control the in-issue work. The County supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

The facts are few and largely undisputed. The County began offering classes through the College in the fall of 1995 at the ATC, an off-campus location. In June 1995, the County advised the College's head of security that it would be providing evening security and escort services at the ATC facility starting in September 1995. For approximately one month from September 1995 to October 1995, security officers, employed by the County at the College and in the unit represented by AFSCME, provided a security presence at the ATC facility from 5:00 p.m. to 11:00 p.m., Monday through Friday, and on weekends, as needed. From October 1995 to April 13, 1996, the same services were provided by a private company, Pro Guard, whose employees also provide security services at the ATC facility from 7:30 a.m to 5:00 p.m., Monday through Friday. On April 13, 1996, the 5:00 p.m. to 11:00 p.m. weekday security services were reassigned to the security officers represented by AFSCME until January

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[1]A "discernible boundary" is simply a particularized definition of unit work within which a union may have exclusivity over work it would otherwise not have established and maintained.

1997, when Pro Guard was once again assigned to provide security from 5:00 p.m. to 11:00 p.m., Monday through Friday, at the ATC facility.

The initial question to be answered in a case alleging a unilateral transfer of unit work from a charging party's bargaining unit is whether the work has been performed exclusively by employees in that unit.[2] As found by the ALJ, the second shift security at the ATC facility was performed in its first year and a half by both the security personnel represented by AFSCME and the employees of Pro Guard. That unit employees had the assignment initially, for only a month, does not establish AFSCME's exclusivity.[3] The employees of Pro Guard performed the second shift security duties for the next seven months. AFSCME's unit employees were then reassigned to provide security from 5:00 p.m. to 11:00 p.m. at the ATC facility for the next seven months. Thereafter, Pro Guard employees were again retained to do that work from January 1997 to the present. Given this assignment and reassignment of the second shift security duties at ATC to both unit and nonunit employees, under no possible analysis of the facts of this case could it be found that AFSCME had ever obtained exclusivity over the work in-issue.[4] As the work was not exclusive bargaining unit work, the County committed no

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[2]Niagara Frontier Transp. Auth., 18 PERB ¶3083 (1985).

[3]See City of Rochester, 21 PERB ¶3040 (1988), conf'd, 155 A.D.2d 1003, 22 PERB ¶7035 (4th Dep't 1989).

[4]AFSCME asserts in its exceptions that it has performed exclusively all off-campus security work for the County and, therefore, the first assignment of the second shift security work at the ATC facility to Pro Guard cannot be seen as a waiver of AFSCME's exclusivity. There is no record evidence to support AFSCME's assertion.

violation when it retained Pro Guard to provide second shift security duties at the ATC facility in January 1997.

AFSCME appears to argue in its brief that the work was reassigned to its unit employees in April 1996 because negotiations between the County and AFSCME resulted in an agreement that the second shift security work would be returned to the unit. Therefore, AFSCME asserts, the assignment of the second shift security to Pro Guard in October 1995 cannot be seen as a waiver by AFSCME of exclusivity over that unit work. There is, however, no record evidence that the decision of the County was based upon negotiations with AFSCME and we, therefore, do not reach it.

Based on the foregoing, AFSCME's exceptions are denied and the decision of the ALJ is affirmed.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UTICA PROFESSIONAL FIRE FIGHTERS ASSOCIATION, LOCAL 32, IAFF, AFL-CIO-CLC,

Charging Party,

- and -

CASE NO. U-18370

CITY OF UTICA,

Respondent.

GRASSO & GRASSO (JANE K. FININ of counsel), for Charging Party

ROEMER WALLENS & MINEAUX LLP (MARY M. ROACH of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Utica Professional Fire Fighters Association, Local 32, IAFF, AFL-CIO-CLC (Association) to a decision by an Administrative Law Judge (ALJ). The Association's charge alleges that the City of Utica (City) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by requiring unit fire fighters to submit to physical examinations under conditions fixed unilaterally by the City to determine their fitness to use respirators safely. After a hearing, the ALJ deferred consideration of the issues raised by the charge to the parties' uninvoked contractual grievance arbitration procedure. In deferring the charge,

the ALJ held that the parties' 1992-96 collective bargaining agreement remained in effect under a continuation clause contained in that agreement.[1] The ALJ then held that the scope of the parties' contractual grievance procedure, which defines a grievance as "any controversy, dispute or difference between the parties arising out of [the] working conditions affecting the employee relations of any individual employee or the Association . . .", gave the Association and its unit employees a reasonably arguable contract right "to be free from the unilateral implementation of the at-issue physical examination procedures . . . ."

The Association argues that the ALJ's deferral of this charge was contrary to law and policy and should be reversed and remanded for decision. In response, the City argues that the ALJ did not err in deferring this charge.

Having reviewed the record and considered the parties' arguments, we reverse the ALJ's decision.

It is unclear whether the ALJ's decision reflects a jurisdictional deferral, a merits deferral or both because the ALJ cited cases on each of these two different types of deferral.[2] In this case, however, it is not necessary for us to identify the type of deferral

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[1]Neither party takes exception to the ALJ's decision in this respect.

[2]In a jurisdictional deferral case, we are deferring an exercise of our jurisdiction to determine whether or not we actually have jurisdiction over a particular charge to permit a contract interpretation to be made by a court, an arbitrator or other appropriate body. A merits deferral presupposes the existence of our jurisdiction over a charge, usually because the parties' contract has expired. In a merits deferral circumstance, we are deferring a decision on the merits of a charge within our jurisdiction to allow for a disposition on the contract questions raised by that charge in another binding, neutral forum, usually grievance arbitration.

the ALJ intended because both require that there be some contractual provision, whether current or expired, which can reasonably be argued to be a source of right to the Association with respect to the subject matter of its charge. There can be no allegation of contract violation triggering the jurisdictional limitations in §205.5(d) of the Act and the corresponding jurisdictional deferral policies, and nothing to grieve for purposes of a merits deferral, unless there is something in the parties' contract which gives the Association a reasonably arguable source of contractual right with respect to the matter in issue under this charge.

The ALJ used the definition of a grievance in these parties' agreement as the arguable source of an Association right to have the employees it represents be free from the City's unilateral imposition of the procedures for the conduct of the respirator physicals and the effects of those physicals. As best we can determine, the ALJ read the right to grieve "working conditions" as the arguable equivalent of a contractual past practice clause or a maintenance of benefits provision,[3] which was arguably violated because the City previously had not conducted respirator fitness testing.

A grievance procedure, however broad its scope, is basically a procedural mechanism which affords the parties to the agreement a forum for the investigation, settlement and adjudication of claimed contract rights. The availability of a forum in which to test those alleged contract rights does not necessarily mean, however, that the forum is itself the source of any substantive rights.

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[3]The parties' agreement does not contain these clauses.

In this case, a right to grieve "working conditions" is not reasonably construed to mean that the Association and its unit employees enjoy any contractual rights regarding the conditions under which respirator fitness physicals are conducted or the effects of those physicals. The quoted phrase within these parties' definition of a grievance is not, in our opinion, reasonably read to embrace respirator fitness physicals. The words "working conditions" ordinarily mean the conditions under which work is actually performed, such that it might reasonably relate, for example, to whether or not an employee is to wear a respirator on the job. We cannot reasonably construe a general right to grieve "working conditions" to bestow upon the Association or the employees it represents the specific contractual right to have employees be free from having to be examined under fixed conditions to determine whether they are able to wear a respirator safely if and when they do actually work at tasks requiring the wearing of a respirator.

The City suggests in its brief that Article III of the parties' contract pertaining to unit employees' sick leave rights is also a basis for deferral of this charge. That section of the contract, not relied upon by the ALJ, is not a source of any right to the Association regarding the City's imposition of the physical examination, the procedures attendant to that examination, or the effects occasioned thereby. Therefore, that section of the contract provides no basis for either a jurisdictional or merits deferral of this charge.

In holding that the ALJ's deferral of this charge, whether jurisdictionally or merits based, was inappropriate, we do not suggest any dissatisfaction with the reasons underlying those deferral policies as developed over many years. The existence of a

contractual right triggering either type of deferral need not be explicit, but it must be at least reasonably arguable. We simply believe that in this case the ALJ converted deferral policies resting on "reasonably arguable" violations of the terms of current or expired collective bargaining agreements into policies which permit and require a deferral whenever an improper practice charge alleges a contract breach which is "remotely possible". The ALJ's decision drains our basic standard for deferral of any real meaning and creates the unacceptable situation where almost no refusal to negotiate charge resting on unilateral action with respect to an allegedly mandatory subject of negotiation would be within our power or discretion to entertain.

For the reasons set forth above, the ALJ's decision is reversed and the case is remanded to the ALJ for such further processing as is appropriate. SO ORDERED.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 589, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,

Charging Party,

- and -

CASE NO. U-19268

CITY OF NEWBURGH,

Respondent.

VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C. (RICHARD S. CORENTHAL and MAUREEN M. STAMPP of counsel), for Charging Party

HITSMAN, HOFFMAN & O'REILLY (ALISON C. FAIRBANKS of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions filed, respectively, by Local 589, International Association of Firefighters (Association) and the City of Newburgh (City) to a decision by an Administrative Law Judge (ALJ) on the Association's charge against the City. The Association alleges in this charge that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it

unilaterally imposed new rules and procedures relating to an employee's eligibility for benefits under General Municipal Law (GML) §207-a.[1]

The ALJ deferred the consideration of the merits of this charge to the parties' uninvoked contractual grievance arbitration procedure.

The Association argues that the ALJ erred in deferring this charge because the parties specifically agreed in §21 of their negotiated GML §207-a procedures that any disputes involving those procedures "shall not be subject to review under the contractual grievance arbitration procedure, but shall be subject to review only by judicial proceeding." Therefore, according to the Association, there is no grievance procedure to which to defer this charge. The City agrees that the ALJ should not have conditionally dismissed this charge pursuant to our deferral policy. It argues, however, that the ALJ should have unconditionally dismissed this charge precisely because the parties have agreed that disputes concerning GML §207-a issues are to be resolved only through judicial proceedings. According to the City, the Association waived any right to file an improper practice charge involving a dispute about GML §207-a issues by agreeing to §21.

Having considered the parties' arguments, we dismiss the Association's charge because the Association has clearly waived any right to file improper practice charges of this type regarding GML §207-a disputes. In dismissing this charge, we reverse that

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[1]The City is now requiring an employee to assist with the completion of a detailed physician's report containing specific information about an employee's injury, course of treatment, medical progress and ability to work. An employee's failure or refusal to assist with the completion of the report is made grounds for termination or denial of GML §207-a benefits.

part of a decision in an earlier case involving these same parties in which the prior Board held to the contrary regarding waiver.[2] Accordingly, we do not decide whether the ALJ was correct in deferring a consideration of the merits of this charge.

In the earlier case, the City, as here, was alleged to have imposed unilaterally a new rule relating to and affecting unit employees' eligibility for GML §207-a benefits. The prior Board found that the parties had negotiated a comprehensive system for the resolution of disputes involving GML §207-a issues, including §21, which provides as follows:

> Any claim of violation, misapplication or misinterpretation of the terms of this procedure shall not be subject to review under the contractual grievance arbitration procedure, but shall be subject to review only by judicial proceeding.

The prior Board held that §21 did not establish a knowing, clear and unmistakable waiver of the Association's right to file an improper practice charge centered upon alleged unilateral changes in GML §207-a rules or procedures relating to or affecting a unit employee's eligibility for GML §207-a benefits.

We agree with the prior Board's conclusion that a union's right to access this agency with improper practice charges of the type here in issue can be waived and that the waiver must be knowing and clear if it is to be given effect. We disagree only with the prior Board's conclusion that §21 is not a plain and clear waiver.

In our view, the prior Board's interpretation of §21 does not give meaning and effect to the language limiting review of any disputes involving GML §207-a to judicial proceeding only. That language is not ambiguous in any respect. Therefore, resort to

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[2]City of Newburgh, 30 PERB ¶3027 (1997).

parol evidence to vary the plain meaning of that language should not have been admitted and should not have been considered in assessing the intent of §21.[3] In effect, the testimony relied upon by the Board in the earlier case created an ambiguity out of language which is otherwise clear on its face.

Even were we to consider the parol evidence relied upon by the prior Board in holding that §21 was not a waiver of the Association's right to bring its improper practice charge, we hold that the testimony was itself ambiguous and of a character insufficient to establish that the parties did not really intend what the words of their "comprehensive" agreement plainly convey. An entitlement to use "only" a judicial proceeding to resolve "any claim" involving a dispute about GML §207-a issues necessarily means redress through that one type of proceeding to the exclusion of all others. Therefore, it is inconsequential that §21 does not refer specifically to improper practice charges.

Although we are reluctant to have a second improper practice charge become the mechanism for a reversal of a recent Board determination on another charge, we are convinced that reversal of the prior decision is the only appropriate course because we consider the prior decision to be incorrect. To allow this charge to continue to a disposition on the merits by the ALJ would be a disservice to both of these parties in

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[3]Milonas v. PERB, 225 A.D.2d 57, 29 PERB ¶7017 (3d Dep't 1996), motions for leave to appeal denied, 89 N.Y.2d 811, 30 PERB ¶7003 (1997). As the Court in Milonas held that parol evidence was not properly considered in that case, it is likewise not properly considered in this case because the language in §21 of the parties' GML §207-a procedures is far clearer than the language in the page rate agreement in issue in Milonas.

these circumstances. An unconditional dismissal of the charge will allow the Association to pursue promptly such appeal as it considers appropriate.

For the reasons set forth above, the charge in this matter is ordered dismissed.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JOHN E. CREEDON POLICE BENEVOLENT ASSOCIATION, INC. OF UTICA, NEW YORK,

Charging Party,

- and -

CASE NO. U-19283

CITY OF UTICA,

Respondent.

GRASSO & GRASSO (JANE K. FININ of counsel), for Charging Party

ROEMER, WALLENS & MINEAUX, LLP (JAMES W. ROEMER, JR. and JEFFREY S. HARTNETT of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Utica (City) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director) on a charge filed against the City by the John E. Creedon Police Benevolent Association, Inc. of Utica, New York (PBA). As relevant to the exceptions,[1] the PBA alleges that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by submitting a nonmandatory subject of negotiation to compulsory interest

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[1]The City did not file any exceptions to the Assistant Director's holding that the other of its proposals at issue under this charge is also a nonmandatory subject of negotiation.

arbitration. The City proposes to modify language in the parties' expired agreement under which disciplinary charges are heard, at the employee's option, in either Civil Service Law (CSL) §75 or binding arbitration proceedings. The City proposes to eliminate the option of a CSL §75 hearing. Under the City's proposal, the City would be privileged to implement a proposed disciplinary penalty pursuant to disciplinary charges against an employee subject to review by a neutral arbitrator under a disciplinary grievance.

The Assistant Director held the City's demand nonmandatory, even though disciplinary procedures by their subject nature are terms and conditions of employment, because under then existing case law an employer could not compel a union to negotiate a waiver or modification of any statutory right held by an employee.

In City of Cohoes (hereafter Cohoes),[2] issued on July 23, 1998, after the Assistant Director issued his decision in this case, we reversed the case law relied upon by the Assistant Director. We held in Cohoes that proposed waivers or modifications of employees' statutory rights are mandatorily negotiable if the demand embraces a term and condition of employment, unless the particular waiver or modification proposed is against public policy or the bargaining has been foreclosed or the union's bargaining obligation has been lifted pursuant to a plain and clear expression of legislative intent.

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[2]31 PERB ¶3020 (1998).

We cannot ascertain any public policy prohibiting the substitution of binding arbitration before a neutral third party for the procedures under CSL §75.[3] Similarly, we find no plain and clear expression of legislative intent in the CSL or any other statute to either prohibit negotiation about arbitration for the resolution of employee disciplinary charges or to exempt either party to a bargaining relationship from the duty to negotiate this term and condition of employment.[4]

For the reasons set forth above, City proposal 22 is mandatorily negotiable. The Assistant Director's decision to the contrary is reversed to that extent.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed as to the allegations concerning City proposal 22.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

[3]American Broadcasting Cos. v. Roberts, 61 N.Y.2d 244 (1984). Plummer v. Klepak, 48 N.Y.2d 486, 13 PERB ¶7527 (1979); Antinore v. State of New York, 40 N.Y.2d 921, 9 PERB ¶7528 (1976), aff'g 49 A.D.2d 6, 8 PERB ¶7513 (4th Dep't 1975); Johnson v. Jorling, 150 A.D.2d 896, 22 PERB ¶7532 (3d Dep't 1989); Elliott v. Arlington Cent. Sch. Dist., 143 A.D.2d 662, 22 PERB ¶7506 (2d Dep't 1988); Harris v. Nassau County Dep't of Social Servs., 134 A.D.2d 499, 21 PERB ¶7509 (2d Dep't 1987).

[4]Auburn Police Local 195 v. PERB, 91 Misc.2d 909, 10 PERB ¶7016 (Sup. Ct. Alb. Co. 1977), aff'd, 62 A.D.2d 12, 11 PERB ¶7003 (3d Dep't 1978), aff'd, 46 N.Y.2d 1034, 12 PERB ¶7006 (1979), construing CSL §76(4).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

REBECA ARMATAS,

Charging Party,

- and -

CASE NO. U-18859

UNITED FEDERATION OF TEACHERS,

Respondent,

- and -

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Employer.

REBECA ARMATAS, pro se

JAMES R. SANDNER, GENERAL COUNSEL (PAUL H. JANIS of counsel), for Respondent

DALE C. KUTZBACH, DIRECTOR OF LABOR RELATIONS (THOMAS A. LIESE of counsel), for Employer.

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Rebeca Armatas to a decision of an Administrative Law Judge (ALJ) dismissing her charge that the United Federation of Teachers (UFT) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when it failed to file a grievance on her behalf with regard to her alleged wrongful

discharge from employment and when it failed to respond to her subsequent requests for information and assistance. Armatas' former employer, the Board of Education of the City School District of the City of New York (District), was made a statutory party pursuant to §209-a.3 of the Act.

A pre-hearing conference was held in this case, after which it was scheduled for hearing.[1] The notices of hearing contain statements that warn parties that failure to appear at a scheduled hearing might constitute ground for the dismissal of the absent party's pleading. After the conference, but prior to the scheduled date of the hearing, Armatas requested the ALJ to issue subpoenas compelling the appearance of nine witnesses to testify at the hearing.[2] The ALJ issued one subpoena for a UFT representative and denied the request as to the other eight individuals. By letter dated October 17, 1997, Armatas objected to the ALJ's denial of the subpoenas as to these eight individuals and advised "[i]f the PERB changes its position regarding the subpoenas, we'll be happy to attend the hearing."

The UFT and the District appeared at the hearing on October 23, but neither Armatas nor any representative for her appeared. Both UFT and the District moved for dismissal of the charge for failure to prosecute based upon Armatas' failure to appear at the hearing. The ALJ thereafter afforded Armatas an opportunity to respond to the

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[1]The hearing was originally scheduled for August 7, 1997, but was rescheduled to October 23, 1997, at Armatas' request.

[2]Armatas requested subpoenas for the President of UFT, the Director of School Personnel of School District 9, the Assistant Principal of the school to which Armatas was assigned prior to her termination, five UFT representatives, and the teacher, unnamed, who filled Armatas' vacant position.

motion in writing. By letter dated November 2, 1997, Armatas confirmed that she would not appear at any PERB hearing because the ALJ had denied her request for subpoenas. The ALJ then dismissed the charge.

In her exceptions, Armatas argues that the ALJ erred in refusing to issue eight of the nine subpoenas she requested. The UFT supports the ALJ's decision. The District did not file any response to the exceptions.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

The issue before us here is not whether the ALJ's ruling on the subpoena requests was correct, only whether dismissal of the charge for failure to prosecute was an abuse of discretion. We conclude that it was not.

Armatas clearly refused and continues to refuse to appear at a hearing on her charge unless the ALJ issues all nine of the requested subpoenas. Section 204.7(b) of our Rules of Procedure provides that "[t]he failure of a party to appear at the hearing may, in the discretion of the designated administrative law judge, constitute ground for dismissal of the absent party's pleading." Armatas was three times advised of this possibility and yet she refused to attend the scheduled hearing unless the subpoenas she requested were issued. A charging party who takes it upon himself or herself to refuse to participate in a PERB proceeding because of an adverse ruling does so at his or her peril because such a refusal constitutes a failure to prosecute the charge and

may result in the dismissal of the charge.[3] Armatas could, and should, have appeared at the hearing, presented her case, taken the opportunity to cross-examine any UFT or District witnesses and appealed the ALJ's ruling on the subpoena request if she was aggrieved by the ALJ's decision. By failing to appear, Armatas lost the opportunity to have her charge heard and to appeal from any procedural rulings made before or at the hearing.

Based on the foregoing, Armatas' exceptions are denied and the ALJ's decision is affirmed.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

[3]See City of Rye, 13 PERB ¶3039, conf'd sub nom. Banahan v. PERB, 13 PERB ¶7012 (Sup. Ct. Albany Co. 1980). See also Board of Educ.of the City Sch. Dist. of the City of New York, 15 PERB ¶3042 (1982).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AUBURN ADMINISTRATORS ASSOCIATION,

Charging Party,

- and - **CASE NO. U-18346**

AUBURN ENLARGED CITY SCHOOL DISTRICT,

Respondent.

PAUL J. DERKASCH, ESQ., for Charging Party

MATTHEW R. FLETCHER, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Auburn Administrators Association (Association) to a decision of the Assistant Director of Public Employment Practices and Representation (Assistant Director) dismissing its charge that the Auburn Enlarged City School District (District) violated §209-a.1(a), (d) and (e) of the Public Employees' Fair Employment Act (Act) when it unilaterally assigned supervision of after-school athletic events to assistant principals at the high school.[1]

The Assistant Director found that attendance at after-school athletic events was an inherent part of the overall responsibilities and duties of assistant principals at the high school and dismissed the charge. The Association argues in its exceptions that

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[1]The alleged violation of §209-a.1(e) of the Act was withdrawn by the Association in its post-hearing brief to the Assistant Director.

the decision is factually and legally incorrect and is not supported by the record.[2] The District filed cross-exceptions, arguing that the Assistant Director erred in dismissing the District's jurisdictional defense, but that in all other respects the decision should be affirmed.

Based upon our review of the record and consideration of the parties' arguments, we affirm the decision of the Assistant Director.

The District employs three assistant principals in the high school. The parties' 1992-1996 collective bargaining agreement requires administrators to work a minimum of eight hours per day. The assistant principals' regular workday runs from 7:30 a.m. to 3:30 p.m. per day, although most days they work until 4:30 p.m. or 5:00 p.m.[3] The current job description for the assistant principals provides:

> As directed by the building on [sic] principal, he/she shall supervise the operations of student services as they pertain to high school such as:
>
> c. Attendance at most major student events, and as assigned by the high school principal
> d. Others, as designated by the high school principal.

In September 1996, Raymond Savareze, the interim high school principal, met with the three assistant principals and told them that they would now be required to attend after-school athletic events. Savareze acknowledged that their required

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[2]The Assistant Director dismissed the alleged violation of §209-a.1(a) of the Act. No exceptions have been taken to this determination.

[3]The high school students are dismissed at 2:20 p.m. and the teachers' contractual workday ends at 2:55 p.m.

attendance was contrary to past practice.[4] Thereafter, Savareze confirmed the assignment in writing, assigning each of the assistant principals to a rotating schedule of eight athletic events during a two-week period.

We will first dispose of the jurisdictional argument raised in the District's cross-exceptions. The District points to contractual language which sets the assistant principals' workday at a minimum of eight hours as depriving PERB of jurisdiction over the instant charge. The charge does not allege an improper extension of the workday, but the assignment of additional duties outside the scope of the assistant principals' job description. As the contract does not provide a reasonably arguable source of right in relevant respect to the Association, we have jurisdiction over this charge.

The Association argues that supervision of after-school athletic events had never before been required of the assistant high school principals and that the District's directive unilaterally changed this practice. There is no dispute that attendance at after-school athletic events is a new duty assigned by the District for the first time in September 1996. What must be resolved is whether the District's requirement of attendance by the assistant principals at after-school athletic events adds duties beyond the essential character, and its related incidental tasks, of their jobs,[5] a change in a mandatory subject of negotiations. The Assistant Director found that it did not, based upon the job description for the assistant principals and the record testimony.

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[4]The assistant principals had not been required to attend after-school athletic events. Prior to September 1996, the athletic director had assigned other staff to supervise these events, for which they received a stipend.

[5]Waverly Cent. Sch. Dist., 10 PERB ¶3103 (1977).

As part of the assistant principals' function of supervising student services, their job description provides that the assistant principals will attend "most major school events" and other events "as assigned by the high school principal" and will perform other related duties "as designated by the high school principal". Two of the major responsibilities of the assistant principals are to maintain student discipline and to schedule, coordinate and attend events at the high school. Diane Dolcemascolo, one of the assistant principals, testified that she had been required to attend after-school student dances, to supervise the teachers who were supervising the students. The record establishes that attendance at after-school athletic events at the high school is an inherent part of the assistant principals' duties and, at the very least, is incidental to their overall duties and responsibilities.[6] Accordingly, the District's assignment of assistant principals at the high school to attend after-school athletic events is not violative of §209-a.1(d) of the Act. The record does not establish that the after-school duty assignment increased the hours the assistant principals had actually been working, as the record shows that they often worked until 4:30 or 5:00 p.m. The contract did not define the assistant principals' maximum hours of work; it set forth their minimum hours, subject to increase when caused by the assignment of after-school activities consistent with their position. As the duties in issue were properly assigned, no violation lies in the derivative increase in hours worked when on after-school assignment, even if the charge were read to include an allegation that hours of work had been increased unilaterally.

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[6]Sacketts Harbor Cent. Sch. Dist., 13 PERB ¶3058 (1980).

Based on the foregoing, the Association's exceptions are denied and the Assistant Director's decision is affirmed.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

EAST RAMAPO SCHOOL NURSES ASSOCIATION, NEA/NY

Charging Party,

- and -

CASE NO. U-18359

EAST RAMAPO CENTRAL SCHOOL DISTRICT,

Respondent.

JOHN B. SCHAMEL, for Charging Party

GREENBERG, WANDERMAN & FROMSON (STEPHEN M. FROMSON of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the East Ramapo Central School District (District) to a decision of the Assistant Director of Public Employment Practices and Representation (Assistant Director) holding, upon a charge filed by the East Ramapo School Nurses Association, NEA/NY (Association), that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by conditioning contract negotiations with the Association upon a settlement of negotiations with its teachers, who are represented in a different negotiating unit.[1]

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[1]The Assistant Director dismissed the allegations that the District had refused to negotiate noneconomic issues until economic issues were settled and had refused to modify any of its proposals. No exceptions were taken to these aspects of the Assistant Director's decision.

A hearing was held at which both parties were present and represented. The Association called three witnesses and then rested. The District then informed the Assistant Director that its only witness, Sol Davis, who had been its chief spokesperson at negotiations, was too ill to testify. The hearing was, therefore, adjourned and the District was afforded the opportunity to consider alternate means to obtain Davis' testimony. Thereafter, the District rested without going forward.[2] Both parties filed legal briefs.

Based on the record evidence, the Assistant Director determined that the District had violated §209-a.1(d) of the Act by stating to the Association that it would not reach agreement with the Association unless and until it concluded contract negotiations with the union representing its teachers and then conducting negotiations with the Association on that basis .

The District excepts to the Assistant Director's decision, arguing that he incorrectly relied on the testimony of one Association witness that was refuted by the testimony of another Association witness. The Association supports the decision of the Assistant Director.

Based upon our consideration of the parties' arguments and our review of the record, we affirm the Assistant Director's decision.

On May 24, 1995, the District and the Association commenced negotiations for a contract to succeed the one expiring on June 30, 1995. The parties met throughout 1995, and on January 22, 1996, at the conclusion of the negotiating session, both sides

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[2]Davis' illness prevented his testimony at any adjourned date.

agreed that negotiations were at an impasse. On May 5, 1996, the parties met with a PERB appointed mediator but did not conclude an agreement. The Association and the District returned to the bargaining table on August 22, 1996, with Esther Schultz, the Association's president and a member of its negotiating team, and Joseph DiVincenzo, the Association's chief spokesperson, representing the Association. Schultz testified that the District's sole representative at the meeting, Davis, told her and DiVincenzo that for the District to settle with the Association "before the teachers would be like wagging the tail of the elephant" . DiVincenzo testified that Davis

> went on to say the elephant comment that the — that would be like — "If we settle with you first it would be like the 'tail wagging the elephant' and that there wouldn't be any settlement with us until there was movement with the teachers' association."[3]

The Assistant Director found that the statements attributed to Davis evidenced the District's intention not to settle with the Association until it had reached agreement with the union representing the teachers. We have previously held that a party violates its duty to negotiate in good faith when it conditions the commencement or continuation of negotiations with the other party to the bargaining relationship on the conclusion of negotiations in a different unit.[4] The record clearly evidences that both witnesses for the Association confirmed that Davis told them that concluding the nurses' contract

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[3]To the extent the record includes testimony regarding one-party conversations with the mediator, that testimony cannot be considered. Act, §205.4(b). Salmon River Cent. Sch. Dist., 10 PERB ¶ 3023 (1977).

[4]Westchester County Med. Ctr. and Westchester County, 13 PERB ¶3038 (1980).

negotiations before an agreement had been reached with the teachers' union would be like "letting the tail wag the elephant". We find no contradiction evidenced by the record. DiVincenzo's and Schultz's testimony about Davis' remarks corroborated each other and the District introduced no evidence to dispute their testimony. The record clearly supports the Assistant Director's finding that the District's strategy was to hold off reaching an agreement with the Association until it reached agreement with the larger teachers' union, a position clearly in violation of §209-a.1(d) of the Act.

Based on the foregoing, we dismiss the District's exceptions and affirm the decision of the Assistant Director.

IT IS, THEREFORE, ORDERED that the District:

1. Cease and desist from conditioning negotiations with the Association on the conduct or outcome of its negotiations with the union representing its teachers; and

2. Sign and post the attached notice at all locations normally used to communicate with unit employees.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the East Ramapo Central School District (District) in the unit represented by the East Ramapo School Nurses Association, NEA/NY (Association) that the District will not condition negotiations with the Association on the conduct or outcome of its negotiations with the union representing its teachers.

Dated . . . . . .

By . . . . . .
(Representative) (Title)

EAST RAMAPO CENTRAL SCHOOL DISTRICT

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, WESTCHESTER COUNTY LOCAL 860, UNIT 9200,

Charging Party,

- and -

CASE NO. U-18659

COUNTY OF WESTCHESTER,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. CRAIN of counsel), for Charging Party

MICHAEL W. WITTENBERG, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Westchester County Local 860, Unit 9200 (CSEA) to a decision of an Administrative Law Judge (ALJ) conditionally dismissing its charge that the County of Westchester (County) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act). The charge alleges that the County unilaterally subcontracted work performed exclusively by employees in the unit represented by CSEA to a private corporation. The County alleges in its answer that CSEA has waived its right to negotiate the decision to subcontract. A hearing was held

on May 8, 1997, at which the parties entered into a stipulation of facts. The ALJ stated at the end of the hearing that the record was closed, but the ALJ did not set a date for briefs because the parties were discussing a possible settlement of the charge. The ALJ notified the parties by letter dated July 25, 1998 that the case had been placed on the "hold" calendar until August 25, 1997 pursuant to their agreement. The parties were informed in that same letter that "any party may request that [the case] be scheduled for another pre-hearing conference or set down for a hearing...."[1] By letter dated August 22, 1997, CSEA asked the ALJ to accept, with the County's agreement, two additional stipulations of fact. The ALJ declined to accept the additional stipulations because the record had been closed. The ALJ then deferred consideration of the merits of the charge to the parties' binding grievance arbitration procedure.

CSEA argues in its exceptions only that the ALJ erred when she denied its request to submit the additional stipulations of fact.[2] The County has not responded to the exceptions.

Based upon our review of the record and our consideration of the parties' arguments, we reverse the ALJ's ruling.

It is not clear that this record was closed at the time CSEA made its motion on August 22, 1997. Although the ALJ stated on the record at the end of the May 8 hearing that the record was closed, the ALJ's July 25 letter to the parties states that

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[1]The letter is a form letter used by staff ALJs to notify parties that a case is being held in abeyance.

[2]CSEA takes no exception to the ALJ's decision to conditionally dismiss the charge.

any party could request that the matter be scheduled for conference or hearing. That letter is reasonably read to give either party the opportunity for an additional day of hearing, which would include evidence submitted under a joint stipulation of fact.

The County consented to CSEA's request and no delay in processing would have been caused by the receipt of the additional stipulations. There was no prejudice to either of the parties or to the agency in accepting the proffered stipulation. Under these circumstances, we hold that the ALJ abused her discretion when she denied CSEA's motion to submit the two additional stipulations of fact.

Based on the foregoing, CSEA's exceptions are granted and the decision of the ALJ is reversed.

IT IS, THEREFORE, ORDERED that the ALJ include in the record the stipulations of fact proffered by CSEA for consideration if the case is reopened pursuant to the terms of the ALJ's decision conditionally dismissing the charge.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AFSCME N.Y. COUNCIL 66, and its affiliated AFSCME LOCAL 450 (CITY OF LACKAWANNA WHITE COLLAR EMPLOYEES' UNION),

Charging Party,

- and -

CASE NO. U-18425

CITY OF LACKAWANNA,

Respondent.

JOEL POCH, ESQ., for Charging Party

FRANK L. BYBEL, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by AFSCME N.Y. Council 66, and its affiliated AFSCME Local 450 (City of Lackawanna White Collar Employees' Union) (AFSCME) to a decision by an Administrative Law Judge (ALJ) on its charge against the City of Lackawanna (City). AFSCME, which represents the City's full-time clerical employees, alleges that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it transferred office clerical work, allegedly exclusive to its unit, for performance by a few nonunit part-time employees.

After a hearing, the ALJ dismissed the charge upon a finding that AFSCME did not have exclusivity,[1] in fact,[2] over office clerical work because a part-time clerical employee had been employed by the City in 1994 to do general clerical work in the Department of Development (DOD) before the work transfers at issue.

AFSCME makes two basic arguments in its exceptions, each directly or indirectly centering on the correctness of its being charged with knowledge that a part-time City employee had ever done office clerical work. First, AFSCME argues that it should not be charged with knowledge of that fact because there was and still is an uncertainty, stemming in part from the City's own representations, as to whether DOD and the Lackawanna Economic Development Zone (EDZ), a program within DOD, are even City departments. Second, that the record testimony of its witnesses, who were credited by the ALJ, is that they did not have actual knowledge until 1996 that the City had employed a nonunit part-time clerical since 1994[3] to do general office work on a regular basis. The City has not filed a response to the exceptions.

Having reviewed the record and considered AFSCME's arguments, we affirm the ALJ's decision.

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[1]Under Niagara Frontier Transp. Auth., 18 PERB ¶3083 (1985), a union must prove exclusivity over the work which has been transferred from its unit before an employer is exposed to any decisional bargaining obligation with respect to that transfer of unit work.

[2] State of New York (Div. of Military and Naval Affairs), 27 PERB ¶3027 (1994).

[3]The length of time this employee worked on a part-time basis is somewhat unclear from the record, but it was of substantial duration, certainly sufficient to permit that employment to be considered in assessing AFSCME's exclusivity over office clerical work.

AFSCME's arguments rest on an alleged uncertainty as to the legal status of the DOD and the EDZ. This alleged uncertainty is very much overstated on this record. The record reveals quite clearly that DOD is a City department and that EDZ is a program within that department which operates with a combination of State and City funds. Source of funding for programs, however, has never itself controlled the employment status of any individual nor whether a program is a municipal function.[4] The EDZ Coordinator, for example, is a City employee, yet he is paid from the same funds which are used to pay the current part-time clerical who is assigned to the EDZ program. Douglas Druzbik, the DOD director, testified without qualification or rebuttal that persons working in DOD and EDZ are City employees.

There is no reasonable basis on this record to reach any conclusion other than that DOD is a City department and that EDZ is a City program within that department. Persons working in those offices, whether full-time or part-time, are City employees like any others working for the City in any other of its departments.

As to AFSCME's second argument, the very nature of office clerical work is the type of regular, open assignment this Board held in State of New York (Division of Military and Naval Affairs)[5] is sufficient to prevent a union from establishing the needed exclusivity in fact over work transferred from a unit for performance by nonunit employees. Therefore, AFSCME's witnesses' testimony that they did not know until

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[4]See Somers Cent. Sch. Dist., 12 PERB ¶3068 (1979); Amityville Pub. Schs., 5 PERB ¶3043 (1972).

[5]Supra note 2.

late 1996 that a part-time employee was employed in DOD to do general clerical work, although credited by the ALJ, does not control the disposition of the question of its exclusivity over office clerical work. That work having been done openly, by a nonunit employee, AFSCME's agents cannot effectively disclaim knowledge for purposes of assessing AFSCME's claimed exclusivity over the work transferred.

Having previously used a part-time employee to do unit work, the City's hiring of a few additional part-time employees to do office clerical work in two City departments was not subject to a decisional bargaining obligation under a charge grounded upon an alleged improper transfer of exclusive unit work.

For the reasons set forth above, the ALJ's decision is affirmed and AFSCME's exceptions are denied.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE NURSES ASSOCIATION,

Charging Party,

- and -

CASE NO. U-17371

COUNTY OF WESTCHESTER,

Respondent.

HARDER, SILBER & BERGAN (RICHARD J. SILBER of counsel), for Charging Party

GREGORY F. MEEHAN, ACTING COUNTY ATTORNEY (LORI A. ALESIO of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Westchester (County) to a decision of an Administrative Law Judge (ALJ) holding that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted the duties performed by registered professional nurses (RNs) at the Westchester County Medical Center (Center) correctional health services unit (CHS) to EMSA Correction Corporation (EMSA). The RNs, no longer employed by the County at CHS, were in a unit represented by the New York State Nurses Association (Association). The County admits that prisoner health care is now being provided by EMSA, but argues that the at-issue work was not exclusive to the

Association's bargaining unit and that the tasks performed by EMSA's Director of Nursing are not substantially similar to the work previously performed by the RNs serving as the Head Nurse and the Assistant Head Nurses.

The ALJ held that the Association had established that it had exclusivity over the work performed by the RNs, Assistant Head Nurses and Head Nurses, and that the work being performed by the EMSA Director of Nursing was substantially similar to the work performed by the Head Nurse and Assistant Head Nurses. The ALJ, therefore, held that the County had violated §209-a.1(d) of the Act when it subcontracted the work performed by unit employees at CHS to EMSA.[1]

The County excepts to the ALJ's decision, arguing that nonunit licensed practical nurses (LPNs) employed by the County at CHS had performed the same duties as the RNs and that, therefore, the Association had failed to prove that the work had been exclusively performed by unit employees. The County also argues that the duties of EMSA's Director of Nursing are not substantially similar to the duties which had been performed by the Assistant Head Nurses and Head Nurse. The Association supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we reverse the decision of the ALJ.

Before the subcontract to EMSA, CHS ran six clinics for inmates at the County jail and penitentiary, staffed by a Head Nurse, three Assistant Head Nurses, RNs and

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[1]The ALJ found no violation of §209-a.1(a) of the Act and no exceptions have been taken to that aspect of the decision.

LPNs.[2] One clinic was open all the time, the other five were open from 8:30 a.m. to 8:00 p.m. Inmates were seen pursuant to slips they filled out requesting care or on an emergency basis. Some were referred to the County's Medical Center. The RNs served as staff nurses at the clinics, where they screened patients upon admission, assessed the nature and the seriousness of the inmates' complaints, made referrals to the specialty clinics or the doctor, handled emergencies and rendered assistance to the doctor. RNs who were working at a specialty clinic returned to the primary clinic when the specialty clinic closed for the day. LPNs worked at the clinics with the RNs. LPNs performed duties similar to those performed by the RNs, but they could not run a clinic or be on duty at night. Most of the time they were on duty with an RN, however, an LPN would work in a clinic alone occasionally for an unspecified period of time.

In asserting that the County's use of LPNs did not breach the RNs' exclusivity over nursing care, the Association argues that the LPNs did not fill in for RNs, the Assistant Head Nurses or the Head Nurse when any of them were on leave. The Association also points to Education Law §6902.1 and 2 as setting forth the duties of RNs and LPNs, respectively, as follows:

> 1. The practice of the profession of nursing as a registered professional nurse is defined as diagnosing and treating human responses to actual or potential health problems through such services as casefinding, health teaching, health counseling, and provision of care supportive to or restorative of life and well-being, and executing medical regimens prescribed by a licensed physician, dentist or other licensed health care provider legally authorized under this title and in accordance with the commissioner's regulations. A nursing regimen shall be consistent with and shall not vary any existing medical regimen.

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[2]All were in the Association's bargaining unit except for the LPNs.

> 2. The practice of nursing as a licensed practical nurse is defined as performing tasks and responsibilities within the framework of casefinding, health teaching, health counseling, and provision of supportive and restorative care under the direction of a registered professional nurse or licensed physician, dentist or other licensed health care provider legally authorized under this title and in accordance with the commissioner's regulations.

Education Law §6903 requires that RNs and LPNs be licensed and §§6905 and 6906 set out the respective licensing requirements for each, including education. RNs are subject to more stringent licensure and educational requirements than LPNs and are authorized to provide a higher level and broader scope of health services than LPNs. While RNs are authorized to independently perform services involving diagnosis and treatment, LPNs are to execute their duties under the direction of an RN or other licensed health care provider. The Association argues that the requirements of the Education Law itself warrant a finding that RNs and LPNs perform different duties.

The Head Nurse and Assistant Head Nurses all were RNs. The Head Nurse was responsible for assigning staff, scheduling meetings, ensuring adequate staffing and the overall supervision of the nursing staff. The Head Nurse reported to the Deputy Director, who was under the supervision of the Associate Hospital Director. The three Assistant Head Nurses reported to the Head Nurse and directly supervised and worked with the staff nurses. The Assistant Head Nurses covered for each other and the Head Nurse when one of them was on leave.

EMSA employs a Director of Nursing, an RN, who reports to the Health Services Administrator, who reports to the Medical Director. EMSA's Director of Nursing performs all the same duties as were performed by the Head Nurse and Assistant Head

Nurses, although she does not provide direct patient care, as did the Assistant Head Nurses. However, the Director of Nursing is also responsible, within EMSA guidelines, for administering the budget and interviewing, hiring and firing the staff she supervises. The Director of Nursing may also fill in for the Health Services Administrator when that person is absent or on leave. The clinics and infirmary run by EMSA are staffed by RNs, LPNs, emergency medical technicians and a coordinator. The infirmary is open twenty-four hours a day and is staffed by an RN. The duties of the RNs and the LPNs employed by EMSA include all of the duties performed by the RNs and LPNs previously employed by the County at CHS.

The ALJ applied the test set forth in Niagara Frontier Transportation Authority[3] (hereafter Niagara Frontier), which holds:

> With respect to the unilateral transfer of unit work, the initial essential questions are whether the work had been performed by unit employees exclusively (footnote omitted) and whether the reassigned tasks are substantially similar to those previously performed by unit employees. If both these questions are answered in the affirmative, there has been a violation of §209-a.1(d), unless the qualifications for the job have been changed significantly. Absent such a change, the loss of unit work to the unit is sufficient detriment for the finding of a violation. If, however, there has been a significant change in the job qualifications, then a balancing test is invoked; the interests of the public employer and the unit employees, both individually and collectively, are weighed against each other. (at 3182).

The ALJ determined that the subcontracted work had been performed exclusively by employees in the Association's bargaining unit. The record in this regard does not support the ALJ's finding.

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[3]18 PERB ¶3083 (1985).

The Association's own witness stated that the LPNs performed work similar to the RNs. The Association argues, however, that the LPNs are statutorily precluded from performing the duties performed by the RNs,[4] an argument focusing on those duties which an LPN can legally be required to perform, rather than on the duties actually performed at CHS by the LPNs. Such an argument, although raised in a different context, was specifically rejected in Hewlett-Woodmere Union Free School District (hereafter Hewlett-Woodmere).[5] There, the District argued that the duties under law of a school librarian were substantially different from a library media specialist so that its unilateral transfer of the library media specialist's duties to the nonunit position of school librarian did not violate the Act. Focusing on the duties actually performed by the library media specialist, we said: "In making the equivalency determination, the relevant examination is of the duties actually performed, not the duties that can be required."[6] The library media specialist had not performed any of the duties specific to that title. Rather, the library media specialist had actually functioned only as a school librarian. When the District transferred those duties outside the unit to the school librarian, we found substantial similarity of tasks by examining the duties actually performed. In Hewlett-Woodmere, we rejected the District's claim that the

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[4]Statutory limitations alone cannot compel a determination on exclusivity, but may be considered as one of the bases in our analysis of the circumstances under which the duties of the RNs and LPNs have been performed. See Union-Endicott Cent. Sch. Dist., 29 PERB ¶3056 (1996) (appeal pending).

[5]28 PERB ¶3039 (1995), conf'd, 232 A.D.2d 560, 29 PERB ¶7019 (2d Dep't 1996).

[6]Id. at 3090 (1995).

focus of the inquiry should be on the duties or tasks which might be required of the library media specialist under law.

As duty differences under law were unavailing to the employer in Hewlett-Woodmere, we must similarly reject the Association's argument that we should, in assessing its exclusivity over nursing care, look only to the duties that the Education Law permits LPNs to perform. Our inquiry focuses on the duties actually performed by the RNs and LPNs at CHS. Here, the record is replete with evidence of the many duties performed by RNs in the CHS. But proof that RNs did nursing duties does not establish that the RNs performed those duties exclusively. Therefore, the Association has failed to satisfy its burden to prove exclusivity. Indeed, what evidence there is on the record is inconsistent with the Association's claim of exclusivity. The Association's own witness testified that the LPNs regularly performed duties similar to those undertaken by the RNs, and they could point to no significant differences between the work actually done by RNs and LPNs. As the inquiry centers on tasks performed, that the RNs may bring to bear greater knowledge, skill, training or qualifications on the delivery of those services is not material to an exclusivity evaluation. On the basis of this record, we cannot find that the RNs' work in the CHS was exclusive to the Association's bargaining unit. The County's transfer of the RNs' duties to EMSA, therefore, did not violate the Act.

The ALJ also found that the work of the Assistant Head Nurses and the Head Nurse was exclusive to the Association's bargaining unit and that the duties of the Director of Nursing were substantially similar to the duties of the Assistant Head Nurses

and the Head Nurse. The record supports the finding that the duties of the Head Nurse and the supervisory duties of the Assistant Head Nurses were performed exclusively by bargaining unit members. However, the duties of EMSA's Director of Nursing are not substantially similar to the duties of the Head Nurse and the supervisory duties of the Assistant Head Nurses.

The ALJ relied on the decision in Hyde Park Central School District[7] (hereafter Hyde Park), as a basis for the analysis of the transfer of unit work from the bargaining unit to the Director of Nursing. The ALJ determined that the duties of the Head Nurse and the Director of Nursing were substantially similar, although finding that the Director of Nursing exercises far greater authority than the Head Nurse. The ALJ decided that because the County had introduced no evidence of an intent to alter its supervisory scheme, a factor present in Hyde Park, the changes in the level of supervision, standing alone, were not sufficient to justify the County's unilateral action. However, because we find that the duties of the Director of Nursing differ substantially from the duties of the Head Nurse and the Assistant Head Nurses, we need not reach an analysis of the County's supervisory scheme and a comparison of the qualifications for each title.

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[7]21 PERB ¶3011 (1988). In Hyde Park, it was determined that although the duties assigned to a nonunit supervisory position encompassed all of the duties of a unit position, there was no violation of the Act because the authority of the nonunit supervisor "vastly" exceeded that of the former unit position, and the qualifications for the new position had significantly changed as part of the employer's decision to alter or redeploy supervisory responsibilities as part of a new supervisory system it had created. It was concluded that some weight must be accorded a public employer's right to alter or redeploy its supervisory responsibilities, at least to the extent of not considering the unit position's supervisory duties in isolation from the supervisory system established by the employer.

Here, the duties of the Director of Nursing, a supervisory title, include all the supervisory duties of the former Head Nurse and Assistant Head Nurses, both supervisory titles within the Association's bargaining unit. There the similarities end. EMSA's Director of Nursing has significantly increased responsibilities and authority beyond that of even the Head Nurse. The Director of Nursing may hire, fire, discipline and increase salaries. Utilization of EMSA's services has resulted in the total elimination of the Assistant Head Nurses, the intermediate level of supervision. The Director of Nursing not only has more authority than the former Head Nurse, she exercises the direct supervisory authority that was exercised by the Assistant Head Nurses, but without the intervening level of supervision and without the responsibilities of the Assistant Head Nurses to provide direct patient care. The title of Director of Nursing is a composite of the two unit positions but with more independence, more authority and different duties and responsibilities.

As was stated in Niagara Frontier and reiterated in Hyde Park, in determining whether there has been an improper unilateral transfer of unit work, the initial essential questions are: 1) whether the at-issue work had been performed exclusively by unit employees and 2) whether the reassigned tasks are substantially similar to those previously performed by unit employees. Inasmuch as we find that the second of these questions must be answered in the negative because the duties performed by the Director of Nursing are not substantially similar to the duties of the Head Nurse and Assistant Head Nurses, the charge in this respect must also be dismissed.

Based on the foregoing, we grant the exceptions of the County and, accordingly, reverse the ALJ's decision.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE NURSES ASSOCIATION,

Charging Party,

- and -

CASE NO. U-17372

COUNTY OF WESTCHESTER,

Respondent.

HARDER, SILBER & BERGAN (RICHARD J. SILBER of counsel), for Charging Party

GREGORY F. MEEHAN, ACTING COUNTY ATTORNEY (LORI A. ALESIO of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Westchester (County) to a decision of an Administrative Law Judge (ALJ) holding that it violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted the renal dialysis duties of registered professional nurses (RNs) employed at the Westchester County Health Center (WCHC) to Dialysis Clinics, Inc. (DCI). The RNs were in a unit represented by the New York State Nurses Association (Association).[1]

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[1]Some of the RNs are still employed by the County at different facilities and in different titles.

The ALJ determined that the RNs in the Association's unit had exclusively performed all the duties which were subcontracted to DCI and that the duties of the DCI employees were substantially similar to the duties performed by the RNs previously employed by the County at the WCHC renal center (center). The County excepts to the ALJ's decision, arguing that the Association lacked exclusivity because licensed practical nurses (LPNs) and medical doctors employed by the County at WCHC had performed the same duties as the RNs. Additionally, the County argues that the duties of the Nurse Manager employed by DCI are not substantially similar to the duties of the Head Nurse formerly employed by the County. The Association supports the decision of the ALJ.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ, in part, and reverse, in part.

The County employed at WCHC a Head Nurse, a Clinician, Charge Nurses, Staff Nurses and Home Training Nurses, all of whom were RNs. Physicians, Medical Technicians and LPNs also worked at WCHC. The center provided services to patients in adult and pediatric intensive care units (ICUs), the center's inpatient and outpatient units, and a home training program to teach patients to do dialysis at home.

The Staff Nurses were assigned to the center and the ICUs, where they were responsible for direct patient care. There were approximately forty Staff Nurses[2] at the center and their duties included: finding access for the two needles required for dialysis,

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[2]The Staff Nurses were primary care nurses, which meant that they were assigned to patients, were primarily responsible for their care and followed them from treatment to treatment.

hooking a patient up to the dialysis machines, performing blood transfusions and administering narcotics as needed, monitoring a patient throughout the dialysis process, removing a patient from dialysis, reviewing the doctor's orders and completing patient flow sheets and nursing orders. Staff Nurses set up, initiate and monitor patients receiving continuous veno-venous hemofiltration (CVVH).[3] Only Staff Nurses could treat patients with acute conditions or young children.

Staff Nurses also performed dialysis on patients in WCHC's pediatric and adult ICUs. Technicians transported the equipment to the patient's room where the Staff Nurse took over, performing all the duties which were performed in the clinics for patients on dialysis.

Charge Nurses were assigned to the center, where one Charge Nurse was assigned to each unit and was responsible for the flow of patients, assignment of nurses to patients, operation of dialysis machines and problem-solving. Charge Nurses spent approximately fifty percent of their time on direct patient care. Charge Nurses were also responsible for teaching patients how to do dialysis at home. Their unit was separate from both the inpatient and outpatient units. In the course of teaching patients, they performed dialysis. They also visited patients at home to monitor their progress.

The center employed one Clinician, who was in charge of staff education and in-service training in dialysis. The Clinician gave most classes, unless a doctor was called

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[3]CVVH is a renal replacement therapy primarily done for ICU patients and entails a slow, continuous filtration of blood at the patient's bedside over the course of several days.

upon by the Clinician to teach regarding a certain medical condition. The Clinician was also part of the center's interdisciplinary team, which reviewed problems and ensured standards were met, as part of the center's quality assurance plan.[4]

The Head Nurse had general responsibility for the center, including patient and staff scheduling and assignments, and related administrative duties. While the Head Nurse could change the RNs' schedules or request overtime for RNs, such a request required a supervisor's approval. The Head Nurse could conduct employee interviews, but could not hire or fire, transfer employees or increase their wages. The Head Nurse operated a dialysis machine only in an emergency. When the Head Nurse was out, the Clinician covered her duties.

Two LPNs were employed at the center, usually not working on the same shift. They took vital signs, connected patients to the dialysis machines and monitored vitals during dialysis. LPNs could not assess a patient's condition or hang blood. The LPNs reported to an RN and together they reviewed a patient's condition. If an LPN programmed a dialysis machine, it had to be reviewed by the Charge Nurse. RNs supervised the LPN's maintenance of the flow sheets. Also, LPNs did not work in the ICUs or with young children or any patients with acute conditions.

Patient Care Technicians were responsible for the maintenance and set up of dialysis machines, but they had no patient care responsibilities. Likewise, physicians did not perform the duties of the nursing staff, although occasionally they did dialyze

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[4]The team was made up of the Clinician, a physician, a dietician and a social worker. This team made most of the center's quality assurance determinations.

patients and utilize a catheter, and some doctors in the renal fellows training program did dialysis, but only under the supervision of an RN or attending physician.

After the County subcontracted to DCI, a Nurse Manager assumed the responsibilities of the Head Nurse, but with the additional responsibilities of hiring, setting salaries and giving bonuses, all within DCI guidelines. Two Clinical Specialists, also RNs, are employed by DCI to perform the education duties previously performed by the Clinician. In addition to the Clinical Specialists, DCI employs a Quality Assurance Nurse to perform the quality assurance duties of the former Clinician. Charge Nurses, RNs, LPNs and Technicians perform the same functions for DCI as their counterparts did under the County's employ.

Niagara Frontier Transportation Authority[5] requires in subcontracting cases that the charging party establish that the work in issue was performed exclusively by employees in its bargaining unit and that the subcontracted work is substantially similar to the unit's work.

The ALJ decided that the duties of the Charge and Staff Nurses, "intrinsic to the dialysis process", were exclusive to the Association's bargaining unit. We disagree. The record establishes that in both the inpatient and outpatient units, where the vast majority of the RNs worked and where most of the work of the renal dialysis center was performed, the connecting of a patient to the dialysis machine, monitoring the patient while on the dialysis machine, recording the patient's condition before and after dialysis, terminating dialysis and completing the flow chart are all duties that were regularly

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[5]18 PERB ¶3083 (1985).

performed by the two LPNs on a daily basis. In County of Westchester,[6] decided by us today, the Association argued, as it does here, that the inherent differences in the duties of RNs and LPNs set forth in the Education Law warrant a finding that the LPNs did not, and could not, perform the duties of the RNs. For the reasons set forth in that decision, we reject the Association's argument.

Here, the LPNs regularly perform the core duties performed by the RNs in the care of dialysis patients. That the RNs may generally supervise the LPNs in the performance of those duties does not alter the nature of the tasks performed by the LPNs. In Town of Brookhaven,[7] it was noted that this Board has "not recognized a discernible boundary when we have been unable to identify a reasonable relationship between the components of the discernible boundary and the duties of unit employees." There is here no boundary that can reasonably be drawn around the work of the RNs in direct patient care at the center that would preserve the Association's exclusivity over that work other than that grounded upon provisions of the Education Law, which we have rejected.

As to the other duties performed only by RNs, such as in the ICUs and in the home training unit, the specific tasks of blood transfusion and the administration of narcotics, we hold that the subcontracting of those duties does not violate the Act. The core component of the unit work is the care and treatment of patients requiring renal dialysis. That RNs exclusively performed a certain few tasks that are peripheral to the

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[6]County of Westchester, 31 PERB ¶3033 (August 17, 1998) (Case No. U-17371).

[7] 27 PERB ¶3063, at 3147 (1994), quoting from Union-Endicott Cent. Sch. Dist., 26 PERB ¶3075, at 3145 (1993).

intrinsic duties of the unit cannot retain for the unit exclusivity over these peripheral duties when exclusivity over the core duties has not been established. We have held that a union does not lose exclusivity over the work of unit employees simply because one or more nonunit employees has occasionally done that same work as an incidental aspect of performing broader functions.[8] The converse must, likewise, be true. Where a union has never acquired or has lost exclusivity over the major aspects of the work at issue, exclusivity is not possessed as to tasks incidental to the performance of the core components of that unit work, even if only unit employees have performed those incidental tasks.

As to the Head Nurse, for the reasons set forth in our decision in County of Westchester, supra, we hold that the duties of the Director of Nursing are not substantially similar to the duties performed by the Head Nurse and that the County did not violate the Act when it subcontracted the duties of the Head Nurse to DCI.[9]

The record, however, supports the ALJ's finding that the Association has established exclusivity over the work performed by the Clinician. The Clinician had no direct patient care responsibilities, as did the RNs. The Clinician performed duties that were not performed by any other employees. That the Clinician served on the center's quality assurance team does not destroy exclusivity. The Clinician's duties were specific to that title. Other members of the quality assurance team had their own

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[8]See, e.g., Union-Endicott Cent. Sch. Dist., 29 PERB ¶3056 (1996) (appeal pending).

[9]The County raised for the first time in its brief to the ALJ that its subcontracting to DCI was part of a plan to alter the supervisory structure of the unit. The ALJ correctly disallowed this argument because there is no evidence in the record to support it.

duties, based upon their positions, training and expertise. The ad hoc teaching by a physician of a specific class, at the Clinician's request, does not affect the exclusivity of the Clinician's in-service training duties.

Based on the foregoing, we deny the exceptions of the County as to the Clinician and affirm the decision of the ALJ as to the Clinician. We grant the exceptions of the County as to the remainder of the unit and, accordingly, reverse the ALJ's decision in that respect.

We hold that the County violated §209-a.1(d) of the Act when it unilaterally subcontracted to DCI the duties performed by the Clinician. In all other respects, the charge is dismissed.

IT IS, THEREFORE, ORDERED that the County:

1. Immediately restore to the Association's unit the duties previously performed at the renal center by the Clinician;

2. Forthwith offer reinstatement to a Clinician position to the employee who held the position at the renal center who was terminated or transferred as a result of the subcontract of those duties to DCI;

3. Make the employee who held the Clinician position whole for the loss of wages, benefits and conditions of employment, if any, caused by the County's subcontract to DCI of the Clinician's duties at the renal center, with interest at the currently prevailing maximum legal rate; and

4. Sign and post notice in the form attached in all locations ordinarily used to post notices of information to employees in the Association's unit.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Westchester (County) in the unit represented by the New York State Nurses Association (Association) that the County will:

1. Immediately restore to the Association's unit the duties previously performed at the renal center by the Clinician.

   Forthwith offer reinstatement to a Clinician position to the employee who held that position at the renal center who was terminated or transferred as a result of the subcontract of those duties to Dialysis Clinics, Inc. (DCI).

3. Make the employee who held the Clinician position whole for the loss of wages, benefits and conditions of employment, if any, caused by the County's subcontract to DCI of the Clinician's duties at the renal center, with interest at the currently prevailing maximum legal rate.

COUNTY OF WESTCHESTER

. . . . . .

Dated . . . . . **By** . . . . . .
(Representative) (Title)

Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE NURSES ASSOCIATION,

Charging Party,

- and -

CASE NO. U-17467

COUNTY OF WESTCHESTER,

Respondent.

HARDER, SILBER & BERGAN (RICHARD J. SILBER of counsel), for Charging Party

GREGORY F. MEEHAN, ACTING COUNTY ATTORNEY (LORI A. ALESIO of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Westchester (County) to a decision of an Administrative Law Judge (ALJ) holding that the County had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted to EMSA Correction Corporation (EMSA) the duties performed by registered professional nurses (RNs) in the Westchester County Medical Center (WCMC) Forensic unit. The RNs were in a unit represented by the New York State Nurses Association (Association).[1]

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[1]Some of the RNs are still employed by the County at different facilities and in different titles.

The Forensic unit is a fifteen-bed inpatient psychiatric unit located at the Westchester County jail. It houses inmates from the County jail and penitentiary who have psychiatric disorders. The unit operated with two shifts, 24 hours a day, seven days a week. As relevant to the case before us, one Head Nurse was assigned to the unit, who reported to the Nursing Supervisor. There were three Assistant Head Nurses, 15 Staff Nurses, six Senior Psychiatric Assistants (SPAs) and one Licensed Practice Nurse (LPN) assigned to the unit. The Head Nurse, Assistant Head Nurses and Staff Nurses were all in the unit represented by the Association; the SPAs and the LPN were not.

The Head Nurse, a RN, worked during the day, eight hours a day, five days a week. The Head Nurse held the ultimate responsibility for all patient care in the Forensic unit, although her responsibilities were primarily administrative and rarely clinical. The Head Nurse attended meetings, made policy, scheduled and evaluated the unit's staff and, in emergencies, did patient care. When the Head Nurse was on leave, one of the Assistant Head Nurses covered her responsibilities.

The three Assistant Head Nurses, all RNs, worked three shifts a week, two on the night shift and one on the day shift. They assigned work to Staff Nurses, the LPN and the SPAs. They did daily scheduling, maintained patient records, and performed quality assurance duties. Most of their time, however, was involved in direct patient care, involving patient assessment, therapy, and medications, as well as making rounds with the physician. When the Assistant Head Nurse was absent, the RN assumed the duties of the Assistant Head Nurse.

The RNs implemented admission procedures, did one-on-one patient interviews to assess nursing needs, completed admission papers, developed a treatment plan, conducted patient orientation sessions and recorded medication orders from the physician. RNs also were responsible for patient discharge procedures and records. On a daily basis, RNs dispensed medication,[2] diagnosed patients, provided medical treatment, including changing bandages, charted patient progress and updated computer records. RNs also accepted telephone orders for medication changes from physicians and authorized correctional staff to restrain patients as necessary. Group therapy sessions for the inmates were provided at the Forensic unit. Physicians, social workers and nurses ran the groups, although an RN attended every session.

Only one LPN was assigned to the Forensic unit and had been there for only a year and a half. On the days the LPN was scheduled, one RN worked as the Charge Nurse and one RN did admissions and discharges. The LPN dispensed medication, did treatments and changed dressings, recorded patients' progress in the patient medical records and picked up physicians' orders. RNs closely supervised the LPN when medication was dispensed. The LPN could not be alone in the unit or be alone with a patient. The LPN never did patient assessment, paperwork, admissions or discharges, treatment plans, computer work or new patient orientation sessions, nor did the LPN take telephone orders from a physician.

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[2]Physicians ordered the medication, some of which was prescribed on an "as needed" basis. The RNs were authorized to determine when and whether a patient required this medication and to dispense it based upon that assessment.

The SPAs monitored and supervised patients, conducted a head count every half hour, checked vital signs, engaged in recreational activities with the patients and helped the patients with "the activity of daily living".[3] SPAs also stayed with patients who had been restrained, but RNs and LPNs also performed that duty.

EMSA employs a Director of Nursing for Forensic Mental Health who performs all the duties formerly performed by the Head Nurse and the Assistant Head Nurses with respect to completing paperwork, attending meetings, and scheduling and evaluating staff. The Director of Nursing also administers the budget, interviews, hires, fires, and determines discipline and salary increases, within EMSA guidelines. The RNs and LPNs employed by EMSA perform the same duties as were performed by the employees in those titles employed by the County.

The ALJ decided that the Association had established exclusivity over all the work performed by the RNs, except for staying with restrained patients, which was also performed by the SPAs, and medical treatment, as that was also performed by the doctors.

The County excepts to the ALJ's decision, arguing that the Association has not established its exclusivity over the work in issue because nonunit personnel shared RN duties and that the duties of EMSA's Director of Nursing are not substantially similar to the duties of the Head Nurse. The Association argues that the duties of RNs and LPNs

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[3]This was intended to help the patients bathe, shave, wear clean clothes and feed themselves.

are inherently different, based upon statutory considerations,[4] and that the ALJ's decision should be affirmed.

Based on our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ, in part, and reverse, in part.

As we noted in County of Westchester,[5] issued today, the standard that must be met is that articulated in Niagara Frontier Transportation Authority,[6] which requires in a subcontracting case that the charging party establish that the subcontracted work had been performed exclusively by its bargaining unit personnel and that the work as transferred is substantially similar to the work formerly performed by unit employees.

Here, the record supports the ALJ's finding that the duties of the RNs have been exclusively performed by the RNs in the Association's bargaining unit. In addition, the ALJ correctly determined that there is no exclusivity as to either staying with restrained patients because the LPN and the SPAs had performed that task or medical treatment decisions because the doctors had performed that function.

The duties of the RNs in implementing admission procedures, conducting patient interviews, developing nursing treatment plans, completing admission and discharge paperwork, conducting orientation sessions and medication group sessions, updating computer records, taking doctors' telephone orders, assessing the need for "as needed"

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[4]The Association relies upon Education Law §6902.1 and §6902.2 which define the practice of nursing by a registered professional nurse and a licensed practical nurse, respectively.

[5]County of Westchester, 31 PERB ¶3033 (August 17, 1998) (Case No. U-17371).

[6]18 PERB ¶3083 (1985).

medications and ordering that patients be restrained are exclusive to the RNs in the Association's bargaining unit. These duties are the "core component" of the unit's work in the Forensic unit. In County of Westchester[7], issued today, we held that the exclusive performance by unit employees of a few duties incidental or peripheral to the intrinsic or core components of the work transferred from the unit was insufficient to establish or maintain exclusivity over the intrinsic work of the unit if nonunit employees had regularly performed the core components of the work. Here, the LPN performed only minor medical duties with respect to dispensing medication, changing bandages, recording daily progress notes in patient medical records and picking up written orders from doctors. This work, performed by one nonunit employee, is not the primary work of the RNs in the unit and cannot deprive the Association of exclusivity over the work of the RNs, which, at times, includes some of the same work as performed by the LPN.

As we decided in both County of Westchester decisions, supra, the duties of the Director of Nursing are not substantially similar to those of the Head Nurse and the Assistant Head Nurses and the County's subcontract of the Head Nurse or Assistant Head Nurses' duties not involving direct patient care does not violate the Act.

Based on the foregoing, we deny the exceptions filed by the County as to the RNs and affirm the decision of the ALJ in that respect. We grant the County's exceptions as to the Head Nurse and Assistant Head Nurses' performance of supervisory and quality assurance duties. As to those, the ALJ's decision is reversed and the charge is dismissed.

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[7]County of Westchester, 31 PERB ¶3034 (August 17, 1998) (Case No. U-17372).

IT IS, THEREFORE, ORDERED, that the County:

1. Immediately restore to the Association's unit the following duties previously performed in the Forensic unit by registered nurses: implementing admission procedures, conducting patient interviews, developing nursing treatment plans, completing admission and discharge paperwork, conducting orientation sessions and medication group sessions, updating computer records, taking doctors' telephone orders, assessing the need for "as needed" medication and ordering that patients be restrained;

2. Forthwith offer reinstatement to their former positions in the Forensic unit to any registered nurses previously included in the Association's unit, if any, who were terminated or transferred as a result of the subcontract of the duties listed in paragraph 1 above to EMSA;

3. Make such employees whole for the loss of wages, benefits and conditions of employment, if any, caused by the County's subcontract of the duties in the Forensic unit listed in paragraph 1 above to EMSA, with interest at the currently prevailing maximum legal rate; and

4. Sign and post notice in the form attached in all locations ordinarily used to post notices of information to Association unit employees.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Westchester in the unit represented by the New York State Nurses Association (Association) that the County will:

1. Immediately restore to the Association's unit the following duties previously performed in the Forensic unit by registered nurses: implementing admission procedures, conducting patient interviews, developing nursing treatment plans, completing admission and discharge paperwork, conducting orientation sessions and medication group sessions, updating computer records, taking doctors' telephone orders, assessing the need for "as needed" medication and ordering that patients be restrained.

2. Forthwith offer reinstatement to their former positions in the Forensic unit to any registered nurses previously included in the Association's unit, if any, who were terminated or transferred as a result of the subcontract of the duties listed in paragraph 1 above to EMSA.

3. Make such employees whole for the loss of wages, benefits and conditions of employment, if any, caused by the County's subcontract of the duties in the Forensic unit listed in paragraph 1 above to EMSA, with interest at the currently prevailing maximum legal rate.

COUNTY OF WESTCHESTER

. . . . . .

Dated . . . . . **By** . . . . . .
(Representative) (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by another material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PUTNAM COUNTY SHERIFF'S OFFICE MANAGERS ASSOCIATION,

Petitioner,

- and -

CASE NO. C-4609

COUNTY OF PUTNAM,

Employer,

-and-

SHERIFF OF THE COUNTY OF PUTNAM,

Intervenor.

WILLIAM J. MCNAMARA, for Petitioner

DONOGHUE, THOMAS, AUSLANDER & DROHAN (JOHN M. DONOGHUE and STUART S. WAXMAN of counsel), for Employer

DECATALDO and DECATALDO (ROBERT T. DECATALDO of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions filed, respectively, by the elected Sheriff of the County of Putnam (Sheriff) and the County of Putnam (County) to an interim decision by the Director of Public Employment Practices and Representation (Director) issued pursuant to a representation petition filed by the Putnam County Sheriff's Office Managers Association (Association). The Association

seeks to become the bargaining agent for a unit consisting of currently unrepresented lieutenants, captains and a chief criminal investigator working within the Sheriff's Department.

The County and the Sheriff dispute the identity of the employer of these employees. The County argues that it is their sole employer. The Sheriff argues that Sheriff's department personnel are employed jointly by the elected Sheriff and the County. The County also argues that the at-issue employees are not eligible for representation because they are managerial within the meaning of §201.7(a) of the Public Employees' Fair Employment Act (Act).

The Director severed the employer issue from the other questions raised by the petition and held that an elected Sheriff is not a joint employer for purposes of the Act. The Director held that the County is the sole employer of the Sheriff's department personnel.

The Sheriff asks us to review the Director's holding that an elected Sheriff is not an employer, joint or otherwise, of Sheriff's department personnel. The County cross-excepts only to the Director's failure to consider certain additional facts allegedly supporting the Director's decision.

Having considered the parties' arguments, we decline to hear the exceptions and cross-exceptions at this time because there are still open questions concerning representation under this petition.

The Director's interim decision represents his ruling on only one of the representation questions raised by the petition. Review of such a ruling is by

permission only pursuant to §201.9(c)(4) of our Rules of Procedure (Rules). The exceptions which may be filed as of right under §201.12 of the Rules are those to the Director's final decision, which issues under §201.11 of the Rules "upon completion of proceedings" before the Director. The proceedings before the Director have not been completed. There remain undecided questions concerning at least the eligibility of any of the employees for representation and the appropriate uniting of any persons found eligible for representation.

This Board has held repeatedly that permission to appeal rulings made in conjunction with the processing of a representation petition will not be granted absent extraordinary circumstances.[1] The novelty of the issue[2] presented in this case does not establish an extraordinary circumstance justifying review of the Director's interim ruling on identity of employer when other representation questions are still pending. Circumstances actually disfavor our granting permission for appeal from the Director's interim ruling because the issue we are asked to decide now might later be mooted by a determination that the employees are managerial as claimed by the County. The Director's ruling on the employer question can be fully reviewed, as necessary, upon exceptions taken to the final decision on the petition.[3] Continuing our policy of

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[1]Town of Saugerties, 30 PERB ¶3002 (1997); Town of Putnam Valley and Town of New Paltz, 28 PERB ¶3049 (1995).

[2]The status of an elected sheriff as an employer of sheriff's department personnel was specifically left open under the Board's decision in County of Nassau and Nassau County Sheriff, 25 PERB ¶3036 (1992), involving an appointed sheriff.

[3]Greenburgh No. 11 Union Free Sch. Dist., 28 PERB ¶3034 (1995); State of New York (Div. of Parole), 25 PERB ¶3007 (1992); North Babylon Union Free Sch. Dist., 20 PERB ¶3028 (1987); United Univ. Professions, 19 PERB ¶3009 (1986).

withholding review of rulings made during the processing of representation petitions until a final decision issues will expedite the processing to completion of all petitions and will also, in this particular case, avoid our deciding a potentially academic question.

For the reasons set forth above, we decline to consider the exceptions and cross-exceptions and remand the petition to the Director for further processing consistent with this decision. SO ORDERED.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, ULSTER COUNTY LOCAL 856, TOWN OF SHAWANGUNK HIGHWAY UNIT,

Charging Party,

- and -

CASE NO. U-18126

TOWN OF SHAWANGUNK,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (ROBERT REILLY of counsel), for Charging Party

SHAW & PERELSON, L.L.P. (GARRETT L. SILVEIRA of counsel, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions to a decision by an Administrative Law Judge (ALJ) filed, respectively, by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFSCME, AFL-CIO, Ulster County Local 856, Town of Shawangunk Highway Unit (CSEA) and the Town of Shawangunk (Town). CSEA alleges in the charge it filed against the Town that the Town violated §209-a.1(d)

of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted guardrail[1] installation to a private contractor.

After a hearing, the ALJ dismissed the charge pursuant to the Town's motion to dismiss.[2] The ALJ held that CSEA did not have exclusivity in fact over guardrail installation because nonunit persons, specifically Jehovah's Witnesses, had once before installed guardrails on a public road running through their land within the Town. This conclusion is the basis for CSEA's exceptions. In reaching her conclusion, the ALJ held that guardrail installation by private contractors in the past did not breach CSEA's exclusivity because the guardrail installation was merely an incidental aspect of those larger construction projects. This and alleged changes in qualifications and guardrail post installation methods are the bases for the Town's cross-exceptions.

CSEA argues in its exceptions that the one time guardrails were installed by Jehovah's Witnesses was both limited and not open, such that it did not know that work had been done until shortly before the hearing in this case. Therefore, CSEA argues that it has maintained exclusivity over the work of guardrail installation notwithstanding the work done by the Jehovah's Witnesses. CSEA argues that the ALJ erred in ruling that work done along a public road is per se open and regular and erred in excluding material and relevant evidence pursuant to that ruling. If the ALJ's decision is not

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[1]Both "guardrail" and "guiderail" are used to identify the traffic safety device at issue in this case.

[2]The ALJ reserved decision on the motion made after CSEA had rested, after which the Town called one witness and then rested. The ALJ granted the motion after review of the record and consideration of the parties' briefs.

reversed, then CSEA argues that the case should be remanded for evidence regarding the circumstances under which the guardrails were installed on the road running through the Jehovah's Witnesses' land.

The Town argues in response to CSEA's exceptions that the ALJ was correct in dismissing the charge because CSEA did not prove exclusivity in fact over guardrail installation. Apart from the work done by the Jehovah's Witnesses, the Town argues in its cross-exceptions that CSEA lost exclusivity over guardrail installation because of the Town's past use of private contractors to install guardrails. The Town argues additionally that the method of guardrail post installation has changed such that its employees are no longer qualified to perform a task which is substantially different from the task as previously performed.

In response to the Town's cross-exceptions, CSEA argues that a qualifications change cannot be considered because it was never raised and was not proven, and that the cross-exceptions are otherwise without merit.

Having reviewed the record and considered the parties' arguments, we deny the Town's cross-exceptions and remand the case to the ALJ pursuant to CSEA's exceptions.

The subcontract at issue was to a private company for the installation of guiderails at an area known as Bordens Road Dam. The nature of the work being done by the contractor at that site is unclear from the record, but it appears to have involved moving existing guiderails and either reinstalling those or installing new posts and rails on both the dam and the adjacent roadway. The process of installation was different

from that which unit employees had used in the past. Pursuant to current state regulation, the posts were pounded into the surface, not placed into holes dug into the surface by employees using a mechanical auger.

Turning first to the Town's cross-exceptions, the few instances in which guiderails were installed by contractors before the work at Bordens Road Dam were properly disregarded by the ALJ in assessing CSEA's exclusivity because the contractors' guiderail work was merely a minor, incidental part of a larger construction project.[3] In this case, the contractor working at Bordens Road Dam appears to have been retained simply to remove, reinstall, and/or install guiderail posts and rails.

That the posts are now pounded into the surface rather than inserted into holes dug into the surface with an auger is immaterial to an assessment of exclusivity.[4] A change in qualifications was not raised by the Town. Even had such a change been raised, there is nothing in the record that would support a conclusion that the qualifications for the operation of a mechanical post pounder are any different than those for the operation of a mechanical auger, let alone "significantly" different as Niagara Frontier Transportation Authority[5] requires before a balancing of the employer's and employees' interests is undertaken. Although the Town does not own a

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[3]The performance of unit work by nonunit personnel as an incident of a different set of tasks or a larger project does not breach a union's exclusivity over that unit work. Union-Endicott Cent. Sch. Dist., 29 PERB ¶3056 (1996) (appeal pending); Village of Malverne, 28 PERB ¶3042 (1995); County of Onondaga, 27 PERB ¶3048 (1994).

[4]It appears from the record that the method for hanging the guiderails or guidewire from the post once installed has not changed in any way.

[5]18 PERB ¶3083.

mechanical post pounder, that is also not relevant to our analysis because, as the ALJ found and the record shows, the Town rented the pounder the contractor used to do the work at Bordens Road Dam.[6] Having made the pounder available to the contractor's employees, the Town could have made it available just as readily to its own employees.

Having denied the Town's cross-exceptions, CSEA's exceptions remain for consideration.

A charging party bears the burden to prove exclusivity over work allegedly transferred improperly from its unit.[7] The record in this case shows that nonunit persons, specifically members of the Jehovah's Witnesses, installed guiderails along Red Mills Road, a public road. CSEA, therefore, does not have exclusivity in fact over guardrail installation under State of New York (Division of Military and Naval Affairs) (hereafter State of New York)[8] unless that work was done other than "openly and regularly". CSEA bears the burden of proof on its claim that the Red Mills Road installation was not open and regular because it is but part of the exclusivity element of its charge.

In this case, the record does not provide any detail as to the circumstances under which the guiderails were installed by the Jehovah's Witnesses. We know from this record only that Red Mills Road is a public road running through private land of

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[6]Compare County of Clinton, 28 PERB ¶3041 (1995)(subcontract no violation where employer had a history of using private contractors for major projects requiring specialized equipment which the employer did not own or otherwise provide).

[7]County of Erie, 28 PERB ¶3053 (1995).

[8]27 PERB ¶3027(1994).

considerable size. From this, the ALJ held that the work was "necessarily done in the open" because Red Mills Road is a public road. As there was no evidence regarding the circumstances under which that work was performed, the ALJ held that CSEA "failed to meet its burden of exclusivity." The absence of evidence in that regard, however, may have been attributable to a statement made by the ALJ during the hearing and it is for that reason that we conclude a remand is warranted.

At the hearing, the ALJ interrupted CSEA's attorney's questioning of a witness to inquire as to whether Red Mills Road is a public road. After the witness answered affirmatively, the ALJ stated: "I don't think I need more information on the Watch Tower Farms if it's a public road." The witness then answered a previously pending question regarding the size of the Jehovah's Witnesses' compound, and there were thereafter no other questions by either party representative probative of the circumstances in which the guiderails were installed on Red Mills Road.

CSEA argues in its exceptions that the ALJ's statement caused it to refrain from offering evidence about the circumstances under which the guardrails were installed by the Jehovah's Witnesses. We agree with CSEA that the ALJ's statement at the hearing might have dissuaded both party representatives from introducing evidence regarding the specific circumstances of the guiderail installation on Red Mills Road, circumstances relevant to a determination as to whether the guiderail installation was open and regular within the meaning of State of New York.

Although CSEA failed to state on the record a specific exception to the ALJ's previously quoted statement, the articulation of an exception was not necessary to

preserve for it an opportunity to argue to us on appeal that the ALJ erred in effectively excluding evidence from the record pursuant to that statement.[9]

As the parties may have been dissuaded by the ALJ's statement during the hearing from introducing evidence regarding the circumstances under which the guardrails were installed on Red Mills Road by the Jehovah's Witnesses, we remand the case to the ALJ for the receipt of such evidence through hearing or stipulation and for such subsequent decision as is then necessary and appropriate. SO ORDERED.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

[9]See County of Orange and Sheriff of Orange County, 25 PERB ¶3004 (1992).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

- and -

CASE NO. U-15220

COUNTY OF NASSAU,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (JANNA PFLUGER of counsel), for Charging Party

BEE & EISMAN (CATHERINE BATTLE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing its charge alleging that the County of Nassau (County) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally began using a new, computerized payroll system which changed or affected several mandatory subjects of negotiation. The County denied the material allegations of the charge and raised several affirmative defenses.

CSEA alleged that after the County began phasing in the NURHS system, a computerized payroll system, it unilaterally increased the lag in payment of overtime compensation to certain unit employees; combined overtime, night differential, nontaxable mileage, meal money and other allowances with regular wages into one paycheck, thereby resulting in increased tax and deferred compensation deductions; increased the time employees had to wait for an adjusted paycheck; discontinued the practice of allowing employees to use leave time during the period in which it was accrued; discontinued the practice of allowing employees to elect compensatory time for time worked on holidays; discontinued maintenance of an employee time and leave record; and discontinued the practice of issuing end-of-the-year paychecks.

The ALJ dismissed the charge in its entirety, finding that, as to several allegations, there had been no change in practice and, as to the remaining allegations, the County was privileged to act as they involved nonmandatory subjects of negotiation.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

CSEA called several witnesses, including its labor relations specialist and local CSEA unit officers, working in various County departments. The County called two witnesses, including Augusta Furino, the County's payroll supervisor. Based upon her fifteen years in the County's payroll department, including five years as payroll supervisor, and her forthright, comprehensive testimony, complete with documentary evidence, the ALJ credited Furino's testimony over that of the CSEA witnesses, which was largely hearsay testimony and unsupported in several instances by any

documentary evidence. There is no record basis to disturb the ALJ's credibility resolutions.

Overtime and Supplemental Checks

There are 52 County Departments with approximately 18,000 full-time and 1,200 part-time employees. All County employees are paid bi-weekly. CSEA employees receive their checks every other Thursday. Employees who had earned monies other than regular wages, such as overtime, received a supplemental check in the week between the regular paydays. After the County implemented the NURHS system, employees received one paycheck, on their usual payday, for their regular wages and any supplemental monies. Prior to the computerization of the payroll, the employees waited from four to six weeks for the payment of overtime. CSEA alleged that after NURHS, some employees in some departments had experienced an increase of up to one week in the amount of time they waited for overtime checks. CSEA further alleged that the inclusion of overtime, differentials and other allowances in the regular paycheck increased the amount of tax and deferred compensation being withheld from the paychecks.[1] CSEA offered no documents supporting this allegation.

The County's established practice is to issue paychecks to unit employees every two weeks. Because of its prior payroll system, the County was compelled to issue overtime checks as part of the supplemental payroll because it could not issue a paycheck based upon two different rates of pay. With the implementation of the

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[1]No evidence was offered with respect to meal allowances, night differential or other supplemental pay and the charge was dismissed as to those allegations. No exceptions were filed as to this aspect of the ALJ's decision.

NURHS system, the condition upon which the issuance of the overtime check depended no longer exists.[2] The County is now capable of issuing a regular paycheck on the regular payday, consistent with its practice of paying these unit employees every two weeks. As the issuance of the overtime check as part of the supplemental payroll arose upon a condition, i.e., the inability to separate rates of pay, when NURHS technology eliminated that inability, the condition giving rise to the overtime checks no longer existed. Discontinuation of the overtime checks upon elimination of the condition which prompted them did not, therefore, change the County's practice.

Additionally, Furino testified that employees generally waited less time to receive overtime compensation under the NURHS system because departments were able to enter the overtime information directly into the computer, rather than submit written forms to the County's Comptroller's office and then wait for authorization to payroll for payment of the overtime. Furino also testified that the overtime was always taxed as supplemental pay under the Internal Revenue Code and that the NURHS system was able to calculate the correct amount of taxes for regular wages and the correct amount for overtime in the same paycheck. As the record evidences no delay in receiving overtime payments and no increase in tax or deferred compensation contributions because of the issuance of one check, this aspect of the charge is dismissed.

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[2]Schalmont Cent. Sch. Dist., 29 PERB ¶3036 (1996); County of Nassau, 27 PERB ¶3049 (1994); State of New York (Governor's Office of Employee Relations and Dep't of Health), 25 PERB ¶ 3005 (1992), conf'd, 195 A.D.2d 930, 26 PERB ¶ 7008 (3d Dep't 1993); New York City Transit Auth., 24 PERB ¶3013 (1991).

Re-issuance of Regular Paychecks

When an employee was incorrectly paid in his or her regular paycheck or failed to receive a paycheck, the paycheck would be returned to the Comptroller's office and redeposited. CSEA alleges that under the prior payroll system, such an employee would receive the corrected paycheck in the next week as part of the supplemental payroll. Under NURHS, CSEA alleges that employees are forced to wait until the next regular payday to receive the corrected paycheck. Furino testified that employees had always received the corrected paycheck on the next regular payday, unless a special request was made because the affected employee would suffer serious financial difficulty if the pay was not forthcoming. Furino testified that this was still the practice and CSEA's witnesses agreed that since the implementation of NURHS they have made such requests on behalf of unit employees, which have been honored by the County. As the record does not support CSEA's allegation that there has been a change in past practice, this aspect of the charge is dismissed.

Use of Leave Time Within the Pay Period Earned

Unit employees accrue one-half day of vacation time and one-half day of sick time per every two-week pay period. CSEA alleges that unit employees had been allowed to use such leave time during the pay period in which it was accrued, until the implementation of NURHS. Furino testified that it has always been the County's practice that time may not be used during the pay period in which it was accrued. Under the prior payroll system, whenever the Comptroller's office became aware of a situation in which a department had allowed an employee to utilize sick or vacation leave in the pay period in which it was earned, the department was notified that this

was contrary to the County's policy and that the employee must make the necessary adjustments to his or her time records. Furino's testimony was confirmed by Eileen Vogel, assistant to the County's Director of Labor Relations, who testified that she had been part of the County's negotiating team for the County-CSEA contract. She had advised the programmers when NURHS was being implemented as to the provisions of the County-CSEA collective bargaining agreement, including the point in time at which leave was accrued. Based on Furino's and Vogel's testimony, the ALJ determined that CSEA had not established any change in practice with respect to the use of accrued time. As the record supports the ALJ's findings, this allegation is dismissed.[3]

Employee Time and Leave Record

Prior to the implementation of the NURHS system, employees received a time and leave record at the beginning of each year which listed their accumulated accruals and upon which they could record accrual and usage of time throughout the year. That has not changed. What has changed is that the County no longer manually enters time and leave information on a time card for its record-keeping purposes. Such information is maintained in the NURHS system and each department has access to the information through computers in each personnel department. The difference is that employees wishing to check their balances now must view a computer screen and receive a computer printout rather than reviewing a time and leave card. While the information may take slightly longer to access and the computer screens and/or

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[3]CSEA also alleged that after NURHS was implemented employees were not allowed to use compensatory time during the pay period in which it was earned. The ALJ dismissed that allegation for failure of proof. No exceptions have been taken to this aspect of the ALJ's decision.

printouts are not in the old format and may prove more difficult to understand initially, there is no violation of the Act. An employer may maintain a record of attendance of its employees and the maintenance of such a record is not mandatorily negotiable.[4] This aspect of the charge is, therefore, dismissed.

End-of-the-Year Checks

Before the NURHS system was implemented, the County produced a split payroll for the pay period which spanned the end of December and the beginning of January.[5] The check issued for the last days worked in December was referred to as the end-of-the-year check. After the implementation of the NURHS system, the County did not issue an end-of-the-year check. Instead, one paycheck was issued in January for the days of the pay period that fell in December and for the days that fell in January. CSEA alleges that this change eliminated one paycheck for each unit employee, the end-of-the-year check, and resulted in all unit employees waiting more time to be paid for time worked in December. In addition, some employees who had reached the limit on social security tax deductions for the year ending in December, and would not have had social security tax withheld from their end-of-the-year checks for the days worked in December, had social security taxes taken out of the January paycheck for the entire pay period. The ALJ determined that the elimination of the end-of-the-year check was merely a change in format and processing of information that did not significantly impact

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[4]Newburgh Enlarged City Sch. Dist., 20 PERB ¶3053 (1987).

[5]Most County employees received a salary increase, due to raises or increments, at the beginning of the fiscal year on January 1. The old payroll system was unable to calculate one paycheck based on two rates of pay so the County issued a year-end paycheck to pay each unit employee for time worked up to the end of the year, at the old rate of pay. The first paycheck in January was for the days worked during that pay period at the new rate of pay.

on terms and conditions of employment. We affirm the ALJ's dismissal of this allegation on different grounds.

As we noted with respect to the overtime checks issued as part of the supplemental payroll, the County's established practice is to issue paychecks to unit employees every two weeks. The County was compelled to issue an end-of-the-year check because it could not issue a paycheck based upon two different rates of pay. When NURHS technology eliminated that inability, the condition giving rise to the end-of-the-year paycheck no longer existed. For the same reasons that there is no violation in the County's including overtime payments in the regular paychecks, we find no violation as to the elimination of the end-of-the-year checks.

Based on the foregoing, we deny CSEA's exceptions and affirm the ALJ's decision.

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 342, UNITED MARINE DIVISION, ILA, AFL-CIO,

Petitioner,

-and-

CASE NO. C-4573

TOWN OF BROOKHAVEN,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that Local 342, United Marine Division, ILA, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the units agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit 1: Included: All employees in the Civil Service titles of Lifeguard and Senior Lifeguard

Excluded: Chief Lifeguard and Assistant Chief Lifeguard

Unit 2: Included: All employees in the Civil Service titles of Beach Manager and Senior Beach Manager

Excluded: Chief Lifeguard and Assistant Chief Lifeguard

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 342, United Marine Division, ILA, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF WALLKILL POLICE BENEVOLENT ASSOCIATION,

Petitioner,

-and- **CASE NO. C-4768**

TOWN OF WALLKILL,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Town of Wallkill Police Benevolent Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Full and part time police officers and sergeants.

Excluded: All other employees

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Town of Wallkill Police Benevolent Association. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 17, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member